RECORD AND I BRIEFS

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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD. AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") FILED ON BEHALF OF ORTHODOX JEWISH ORGANIZATIONS IN SUPPORT OF PETITIONERS

Of Counsel
DENNIS RAPPS
NATIONAL JEWISH
COMMISSION ON LAW
AND PUBLIC AFFAIRS
450 Seventh Avenue
44th Floor
New York, NY 10123
(646) 598-7316
drapps@dennisrappslaw.com

NATHAN LEWIN
Counsel of Record
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
888 17th St. NW, 4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Attorneys for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Free Exercise Clause is violated by enforcement of a local public-accommodations law that orders an individual business-owner to participate meaningfully in a ceremony if such participation in the ceremony violates the business-owner's religious convictions, and equivalent participation can readily be obtained from other sources.

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for the past half century. COLPA's first *amicus* brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 35 *amicus* briefs to convey to this Court the position of the leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this *amicus* brief:

> Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.
>
> National Council of Young Israel is a synagogue-based Orthodox Jewish organization with a network of more than 110 affiliated congregations and 25,000 member families spreading across the

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. Petitioners and the Colorado Civil Rights Commission have provided blanket consents. Consent has been received from Respondents Craig and Mullins.

United States. It advocates for the issues relevant to the Orthodox Jewish community.

Orthodox Jewish Chamber of Commerce is a global network of businesses of all sizes and is dedicated to enhancing the opportunities of Jewish businesses and professionals around the world. It has a particular interest in protecting the Orthodox Jewish business community against public policies and laws that threaten their freedom to act in accord with their religious beliefs.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 950 members that has, for many years, been involved in a variety of religious, social and educational endeavors affecting Orthodox Jews.

Union of Orthodox Rabbis of the United States and Canada is the oldest Orthodox Jewish rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Orthodox Jewish community.

The decision of the Colorado Court of Appeals that is under constitutional review in this case presents a real danger to the future free exercise of Orthodox Jewish observance in this country. As we demonstrate in this brief, Jewish religious law evaluates and, in certain circumstances, forbids an

observing Jew from assisting, in a meaningfully participatory manner, in the commission of violations of Torah law – even violations by non-Jews. Passages in the Talmud and substantial portions of treatises on Jewish Law ("Halacha") concern prohibited assistance to certain violations. A religiously observant Jewish business-owner faces a cruel (and, we submit, constitutionally impermissible) personal choice if he is compelled by a local law – under threat of substantial fines and loss of a business license – to engage in conduct that might violate Halacha and participate, contrary to the demands of his or her conscience, in conduct that is religiously prohibited.

This *amicus* brief is not limited, as is the presentation of the petitioners, to participation that might be deemed "speech" protected by the First Amendment. Our contention regarding the reach of the Free Exercise Clause extends to ***any*** conduct that could constitute religiously prohibited substantial participation in a ceremony. The owner of a chartered bus service – plainly not engaging in speech – may be asked to transport guests to a same-sex wedding. He is, in our view, similar to the creator of ceremonial cakes, to an artistic florist, or to any artist commissioned by a same-sex couple.

This case and several others that have arisen in various jurisdictions concern Christian merchants who have refused, on account of their religious convictions, to provide significant requested services to same-sex couples celebrating their weddings. As Orthodox Jews who follow the commands of the Torah, we cannot condone same-sex marriage. In

filing this brief we do not represent to the Court that there is a consensus that Halacha either permits or prohibits an observant Jewish baker from providing the services here requested to Jews or to non-Jews. Our concern is with the ramifications of the decision below. Affirmance of that holding will, we believe, endanger Jewish religious observance.

Our brief is not limited to the conflict between a person's religious observance and this Court's constitutional endorsement in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), of same-sex marriage. The issue presented by this case can and will arise in other contexts. The more general issue is whether religious believers may be compelled by law to engage in conduct that their religion prohibits in order to enhance the ceremonies of individuals who can obtain equivalent participation from other sources but choose to force the believers to breach their religious commitments.

This brief does not address a question not presented in this case – *i.e.*, whether the Free Exercise claim should prevail even if there is no other source to provide the requested service. That issue should await a case in which the record presents such facts.

SUMMARY OF ARGUMENT

1. Jewish Law reproaches not only one's own violations but, based on a Biblical passage and extensive rabbinic interpretation over centuries, also deters active participation in another person's conduct that violates religious prohibitions. Orthodox Jews in American contemporary society

may confront situations in which seemingly neutral laws might compel them to participate significantly in the conduct of others in a fashion that would violate their religious rules. Government compulsion to participate in such cases is substantially the same as a direct official command to infringe a religious command.

2. The service that was denied in this case was readily obtained from another source. The only purpose of initiating a proceeding against the petitioners was to override their religious objection to meaningful participation in a same-sex wedding. Hence the Commission's order amounted to "covert suppression of particular religious beliefs" and was invalid under *Church of the Lukumu Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

3. This Court and lower federal courts will find little difficulty in preventing false religious claims by opponents of same-sex marriage who object, for secular reasons, to same-sex marriage. Courts have been able to distinguish, after hearing evidence, between true and false claims based on religious belief.

ARGUMENT

I.

AN INDIVIDUAL'S MEANINGFUL PARTICIPATION IN FORBIDDEN CONDUCT BY OTHERS, INCLUDING NON-JEWS, IS A SUBJECT OF SERIOUS CONCERN UNDER JEWISH LAW

The Bible commands in *Leviticus* (19:14): "Do not place a stumbling-block before the blind." This seemingly obvious instruction of decency has given rise to an extensive body of Jewish Law regarding the religious prohibition of substantial assistance in the commission of religious violations. The Talmud (*Avodah Zarah* 6b) teaches that "a person should not extend a cup of wine to a Nazirite [who may not drink wine] nor a limb from a living animal to Noahides [non-Jews who comply with seven "Noahide" commandments, one of which prohibits eating limbs taken from live animals]." The basis for these religious prohibitions, personally incumbent on religiously observant Jews even in relation to non-Jews, is the Biblical directive against placing a stumbling-block before the blind.

In his classic enumeration of the 613 commandments of the Torah (*Sefer Ha-Mitzvot*), Maimonides (1135-1204) said that this "Negative Commandment also applies to helping or causing another to commit a transgression, because to do this is to aid and abet in his wrongdoing a man whom passion has deprived of his reasoning power and blinded, or to provide him with opportunities for sin." Charles B. Chavel, The Commandments: Sefer Ha-Mitzvoth of Maimonides, Part two, p. 278

(Soncino Press 1967). See also the *Sefer Ha-Chinuch* ("Book of Torah Education"), a classic authoritative source of unknown authorship written late in Thirteenth Century that also defines this Biblical injunction as covering "a person who would help someone committing a transgression." 3 Charles Wengrov, Sefer ha-Hinnuch 54-58 (Feldheim 1984). One contemporary rabbinic analysis discussing traditional sources is Mark Dratch, "The Ethics of Selecting a Political Candidate," 11 Journal of Halacha and Contemporary Society 5-18 (1986).

The rabbis of the Mishna and the Talmud explicitly prohibited even unintended financial support. Commercial transactions and gifts to idolators are forbidden in the period immediately preceding idolatrous holidays. Tractate *Avodah Zarah* 2a ("During the three days preceding the festivals of idol worshippers, it is forbidden to transact business with them, to lend them articles, to borrow articles from them, to lend them money, to borrow money from them, to repay a debt to them, or to accept payment of a debt from them.") See also Maimonides, *Mishneh Torah*, Laws of the Worship of Stars and Their Statutes (*Hilchot Avodat Kochavim Ve-Chukotcihem*), Chapter 9, Paragraphs 1-8.

The personal duty to avoid meaningful participation in another person's religiously prohibited behavior is, under Jewish Law, a primary obligation and not merely a form of secondary observance. A religiously observant Jewish business-owner who is forced by law to participate meaningfully, in a manner rabbinically determined to be prohibited, in another person's sinful conduct is

being denied protection for his or her ***own*** religious observance. This denial of religious liberty is equivalent to being punished for performing a religious ceremony or barred by law from engaging in obligatory religious conduct.

If an Orthodox Jewish owner of a limousine service were asked, for example, to provide group transportation to a religious ceremony in which participation is prohibited by Torah law, he could find rabbinic support for claiming that he, like Jack Phillips, would be committing a personal sin by complying. A comparable situation was that of Somali Muslim cabdrivers at the Minneapolis Airport who refused, on similar grounds, to accept passengers with wine in their luggage because some Muslims believe that transporting alcohol is religiously prohibited. See "Muslim Cabbies," http://religionandprofessions.org/1328/muslim-cabbies-case-study/; "Is It O.K. to Fire a Muslim Driver for Refusing To Carry Wine?" New York Times Magazine, July 19, 2017. Although contemporary proponents of civil liberties have supported the Muslim cabdrivers, some have inconsistently opposed the religiously observant business-owners in cases initiated by same-sex couples.

II.

GOVERNMENT MAY NOT CONSTITUTIONALLY PREVENT OR RESTRICT RELIGIOUS OBSERVANCE IF ALTERNATIVE RESOURCES ARE READILY AVAILABLE AND THE ONLY MOTIVE FOR ENFORCEMENT IS TO OVERRIDE RELIGIOUS OBSERVANCE

A. The Colorado Civil Rights Commission's Enforcement Action Targeted and Singled Out Religious Observance

It is undisputed on this record that the respondent same-sex couple was able, with no inconvenience whatever, to obtain an equivalent free wedding cake from a local wedding-cake artist. JA 184-185; Brief for Petitioners, p. 10. Other than having their initial request rejected and having to obtain a wedding cake from one of many other available sources, the same-sex couple was not injured in any way. Indeed, the couple ultimately profited financially from Mr. Phillips' refusal to prepare their requested cake at his customary fee.

The ***only*** purpose and motive for (a) instituting an administrative proceeding against Jack Phillips and (b) enforcing Colorado's public accommodations law against him was to compel Phillips and others who have religious objections to same-sex marriages to violate their religious convictions and participate in the ceremony if another same-sex couple ever requests meaningful participation in a same-sex wedding. The record contains no suggestion that any future same-sex couple in Colorado will encounter

any difficulty in finding an alternative source for participation in their wedding.

Under these circumstances, the decision in this case is controlled by this Court's ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). This Court observed in its *Lukumi Babalu Aye* opinion that "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'" 508 U.S. at 534 (citations omitted). On this account, said the Court, "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.*

This Court held ordinances of the City of Hialeah unconstitutional in *Lukumi Babalu Aye* because "suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* In the present case, there is little doubt on the undisputed evidence that the enforcement proceeding initiated before the Colorado Civil Rights Commission was not needed to enable same-sex couples to obtain all the services a same-sex couple might want for wedding celebrations in Colorado.

The relief sought in the administrative proceeding and the order entered by the Commission were designed primarily, if not exclusively, to demonstrate to owners of public accommodations in Colorado who have religious objections to participating in same-sex marriages that Colorado

law will penalize them if they honor their religious convictions and refuse to participate in same-sex marriage ceremonies by withholding important services. Hence, in reality, the proceeding before the Civil Rights Commission and the order entered by that Commission "target[ed] religious conduct for distinctive treatment" and "advance[d] legitimate governmental interests only against conduct with a religious motivation." It follows that under the *Lukumi Babalu Aye* standard, to be found constitutional the Commission's order "must advance '"interests of the highest order"' and must be narrowly tailored in pursuit of those interests." 508 U.S. at 546. This dual standard is met "only in rare cases." *Id.* The Commission's proceeding and order satisfy neither part of the dual standard.

B. The Administrative Proceeding Did Not Serve an Interest of the Highest Order.

There is no evidence in the record that unless Colorado's public accommodations law is enforced unconditionally against business-owners whose religious convictions bar their participation in same-sex weddings, couples who want to celebrate a same-sex marriage in Colorado will be unable to do so. There was, therefore, no "interest of the highest order" in proceeding against Jack Phillips. Even if Mr. Phillips' services are unavailable, there are many wedding-cake artists in Colorado who are ready and willing – for a price and possibly even, as in this case, free of charge – to provide artistic wedding cakes for same-sex couples.

C. Maximum Unconditional Enforcement of the Public Accommodations Law Is Not "Narrowly Tailored."

Is there a "narrowly tailored" remedy for a same-sex couple seeking an artistic wedding cake in Colorado from a wedding-cake artist whose religious belief prohibits his participation in a same-sex wedding? The sweeping order of the Civil Rights Commission that not only orders Jack Phillips to design wedding cakes that he deems sinful but directs his staff to do the same and to submit periodic compliance reports to the Commission is surely not "narrowly tailored" to remedy Phillips' honest good-faith disagreement over the scope of religious liberty.

Nor is the failure to provide any procedure to see whether the competing interests may be settled. A same-sex couple should demonstrate, as a condition to obtaining relief against a business-owner who has a religious objection to participating in their wedding event, that the couple could not obtain a comparable service from a willing vendor. Moreover, the same-sex couple should be required to explore (and possibly negotiate) with the business-owner over the possibly permissible extent of his participation in the wedding. Would Jack Phillips have agreed, if the parties had had more than the brief exchange shown in this record, that he could, in good conscience, provide either a cake or a design that the same-sex couple could use in their wedding ceremony?

Compelling immediate and total compliance and imposing instructional and reporting requirements

as the Colorado Civil Rights Commission did in this case was surely not the "narrowly tailored" remedy that First Amendment law contemplates. Consequently, the decision of the Colorado Court of Appeals must be reversed.

III.

OPPONENTS OF SAME-SEX MARRIAGE FOR SECULAR NON-RELIGIOUS REASONS WILL NOT BE ABLE TO INVOKE THIS COURT'S REVERSAL TO CLOAK AN IMPERMISSIBLE MOTIVE

Supporters of the decision of the Colorado Court of Appeals may contend that across-the-board sweeping enforcement of the public accommodations law is necessary because business-owners whose objections to same-sex marriage are not based on religious convictions will be able, if the decision below is reversed, to evade legal obligations by falsely asserting a religious claim. A religious liberty claim should not be denied because its vindication will generate claims that are not truly based on religious belief. See, *e.g.*, *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). Courts are capable of determining whether a claim is based on an honest religious belief or whether the religious claim is a sham. *E.g.*, *Goff v. Graves*, 362 F.3d 543 (8th Cir. 2004); *Theriault v. Silber*, 453 F. Supp. 254 (W.D. Tex.), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979).

CONCLUSION

For the foregoing reasons the judgment of the Colorado Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel
DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS
450 Seventh Avenue
44th Floor
New York, NY 10123
(646) 598-7316
drapps@dennisrappslaw.com

NATHAN LEWIN
Counsel of Record
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Attorneys for Amici Curiae

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